STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY OF FREMONT, Employer, and GROUP OF EMPLOYEES, Petitioner, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Exclusive Representative.	Case No. SF-OS-199-M PERB Order No. Ad-403-M November 21, 2013

Appearances: Debra S. Margolis, Assistant City Attorney, and Liebert, Cassidy & Whitmore by Richard C. Bolanos, Attorney, for City of Fremont; Patricia Christianson for Group of Employees; Weinberg, Roger & Rosenfeld by Kerianne R. Steele and Vincent A. Harrington, Attorneys, for Service Employees International Union, Local 1021.

Before Martinez, Chair; Huguenin, Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on an administrative appeal by Service Employees International Union, Local 1021 (SEIU) from an administrative decision issued by the Office of the General Counsel to conduct an agency fee rescission election among employees of the general bargaining unit in the City of Fremont (City). Along with its administrative appeal, SEIU filed a request for stay of activity pursuant to PERB Regulation 32370[1] to stay the conduct of the

[1] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

rescission election. SEIU also filed an interlocutory appeal from this same decision, in which the Office of the General Counsel joined.

For reasons discussed below, we dismiss the interlocutory appeal and the request for a stay of activity, and remand to the Office of the General Counsel the rescission petition for an investigation of the facts and a determination of SEIU's claims that: (1) the Meyers-Milias-Brown Act (MMBA)[2] prohibits a rescission election after a memorandum of understanding (MOU) has expired; and (2) a rescission election cannot occur during the pendency of the unfair practice charges filed by SEIU against the City because those alleged unfair practices prevent employees from exercising free and fair choice in a rescission election.

PROCEDURAL HISTORY

On June 20, 2013, a group of employees in the City's general bargaining unit, led by Patricia Christianson (Christianson), filed a petition to rescind the agency fee provision included in the July 1, 2011 to June 30, 2013 MOU between the City and the "Fremont Association of City Employees affiliated with Service Employees International Union (SEIU), Local 1021." (MOU, § 1, Parties to Understanding.)[3] The petition listed as the exclusive representative, the "Fremont Association of City Employees (FACE)."

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[2] The MMBA is codified at Government Code section 3500 et seq. All further section references are to the Government Code.

MMBA section 3502.5, subdivision (d) provides, in pertinent part:

> An agency shop provision in a memorandum of understanding that is in effect may be rescinded by a majority vote of all the employees in the unit covered by the memorandum of understanding, provided that: . . . (3) the vote may be taken at any time during the term of the memorandum of understanding, but in no event shall there be more than one vote taken during that term.

[3] There is a dispute over the identity of the exclusive representative which is at the center of PERB Case No. SF-CE-1028-M, which is currently before the Board on exceptions to a proposed decision by an administrative law judge. PERB has made no final determination on

On June 26, 2013, the Office of the General Counsel sent Christianson a filing deficiency letter because the description of the exclusive representative as "Fremont Association of City Employees (FACE)" appeared to be inaccurate. In response to a petition for injunctive relief filed by PERB on May 1, 2013, a superior court judge enjoined the City of Fremont, its agents and employees from failing or refusing to recognize SEIU, Local 1021 as the exclusive representative of the general bargaining unit.[4] Because the rescission petition listed "FACE" as the exclusive representative, the Office of the General Counsel deemed the petition deficient and gave Christianson until July 1, 2013, to file an amended petition.

An amended petition was filed on July 1, 2013, naming as the exclusive representative SEIU, Local 1021. On July 8, 2013, the Office of the General Counsel wrote to the interested parties (Christianson, Brian Scott, the City's Human Resources Director, Kerianne R. Steele (Steele), attorney for SEIU, and Roxanne Sanchez, president of SEIU), informing them that the amended rescission petition had been filed alleging that a fair share agreement is currently in effect for the general bargaining unit. By this letter, the Office of the General Counsel requested the employer to file a list of all persons employed in the general bargaining unit as of the last date of the payroll period immediately preceding the date the amended petition was filed with PERB. Both SEIU and the City were asked to file written statements within 10 calendar days regarding whether the City had a procedure for rescission of agency fee provisions and to include "any other pertinent facts or issues which should be addressed during PERB's investigation regarding the validity of this amended petition." (PERB ltr. dated July 8, 2013.)

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the merits of Case No. SF-CE-1028-M, and no inferences should be drawn on that issue from our decision in this case.

[4] See *City of Fremont* (2013) PERB Decision No. IR-57-M, determining that injunctive relief was appropriate in PERB Case No. SF-CE-1028-M.

In response, the City confirmed on July 19, 2013, that it has no local rules or procedures for the rescission of an agency shop provision, and noted that the MOU provided that the agency shop provision "may be rescinded by majority vote of all employees in the bargaining unit in the manner provided in Government Code 3502.5(b)."[5] A list of bargaining unit employees was included in the City's response.

SEIU submitted its position statement on July 24, 2013, and urged that the rescission petition be dismissed for two reasons. First, SEIU asserted that the petition "is the direct product of the City's unlawful conduct that is the subject of the pending unfair practice case—PERB Case No. SF-CE-1028-M." In support of this contention, SEIU purported to "incorporate by reference herein all facts, arguments and legal authorities contained in the filings in Case No. SF-CE-1028-M and in Injunctive Relief Case No. 633-M." It asserts that, but for the City's alleged improper processing of a decertification petition in January 2013, its alleged unlawful withdrawal of recognition from SEIU, and its alleged subsequent refusal to bargain with SEIU, [6] the rescission petition would not have been filed. SEIU also represented that if PERB "continues to process this tainted rescission petition, SEIU Local 1021 may consider submitting a renewed request for injunctive relief with PERB and/or a request for an amended preliminary injunction against the City."

SEIU also asserted in its position statement that the rescission petition was untimely because under MMBA section 3502.5, subdivision (d), a rescission election may only occur during the life of an MOU and that the MOU in question expired on June 30, 2013.[7]

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[5] No party contests these representations by the City.

[6] These allegations are contained in Case No. SF-CE-1028-M.

[7] Petitioner disputes that the MOU expired, pointing to a clause in the MOU that provides:

On July 26, 2013, the City submitted a letter to the Board agent urging PERB to disregard SEIU's position statement because it "incorrectly identifies SEIU [Local] 1021 as 'the exclusive representative'" of the general bargaining unit, and failed to disclose complete evidence regarding a 1997 agency fee agreement.

The Office of the General Counsel issued a letter on July 31, 2013, to Christianson, Steele and the City's attorney, Richard C. Bolanos, informing them that investigation of the agency fee rescission petition established the following facts: (1) "[t]he current representative of the 'General' bargaining unit . . . is [SEIU] Local 1021"; (2) Article 1, Section 10(A) of the MOU between "the exclusive representative and the City of Fremont" contains an agency fee provision; (3) a written agreement dated March 20, 1997, between the City and SEIU Local 790 contains an agency fee provision; and (4) the City does not have local rules adopting procedures for an agency fee rescission election. Proof of employee support that accompanied the petition was deemed sufficient. Consequently, the Office of the General Counsel determined that an election should be conducted. The letter concluded by setting a date of August 12, 2013, for a conference to discuss the mechanics of the election.

On August 3, 2013, SEIU filed with PERB both an administrative appeal from this decision to conduct the rescission election pursuant to PERB Regulation 32360[8] and a request for stay of activity pursuant to PERB Regulation 32370.[9]

> Unless otherwise so provided, this Memorandum of Understanding shall be effective July 1, 2011 and shall expire on June 30, 2013 and shall continue in effect from year to year thereafter unless terminated or modified as provided herein.

(MOU, Art. 11, § 1.) Neither modification nor termination has occurred, according to Petitioners.

[8] PERB Regulation 32360, subdivision (a) provides, in pertinent part: "An appeal may be filed with the Board itself from any administrative decision."

On August 15, 2013, SEIU filed an interlocutory appeal with the Office of the General Counsel, claiming that "PERB Regulations do not clearly define administrative decisions and interlocutory orders," and "[i]n an effort to be thorough," SEIU was filing both an administrative appeal and an interlocutory appeal regarding the same July 31, 2013 determination by the Office of General Counsel.[10] SEIU's letter concluded: "Please be advised that if neither Appeal is adjudicated in a timely fashion, we will also pursue a blocking charge."[11]

The grounds for both the interlocutory and the administrative appeal are the same—the petition is untimely because there is no MOU in effect, and the rescission petition is tainted by the City's alleged unfair practices.

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[9] PERB Regulation 32370 provides, in pertinent part:

> An appeal will not automatically prevent the Board from proceeding in a case. Parties seeking a stay of any activity may file a request for a stay with the administrative appeal which shall include all pertinent facts and justification for the request.

[10] PERB Regulation 32200 provides, in pertinent part:

> A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself. . . . The Board agent may . . . join in the request and certify the matter to the Board. The Board itself will not accept the request unless the Board agent joins in the request. The Board agent may join in the request only where all of the following apply:
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> (a) The issue involved is one of law;
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> (b) The issue involved is controlling in the case;
>
> (c) An immediate appeal will materially advance the resolution of the case.

[11] A blocking charge is an unfair practice charge that alleges that alleged conduct "relating to the voting unit . . . would so affect the election process as to prevent the employees from exercising free choice." (PERB Reg. 61190.)

On August 23, 2013, Christianson filed a position statement in response to SEIU's interlocutory appeal. She opposed the request for stay, asserting that the alleged unfair practices are unrelated to the rescission petition, because regardless of the outcome of the election, the exclusive representative will not change. Christianson also asserts that the MOU is still in effect by operation of the "evergreen" clause, set forth in footnote 7, above.

On August 23, 2013, the Office of the General Counsel joined in SEIU's request to certify the interlocutory appeal to the Board itself. The certified issue of law was stated as follows: "whether Government Code section 3502.5 prohibits PERB from conducting an agency fee rescission election when there is no Memorandum of Understanding (MOU) in effect." The General Counsel made no finding on the factual predicate of this issue, viz., whether the MOU in this case was in effect or not. This letter concluded, "At the direction of the General Counsel, further election proceedings in this matter will be stayed pending a decision by the Board itself."

DISCUSSION

The Rescission Petition

In the absence of local rules, agency fee rescission petitions under the MMBA are governed by section 3502.5, subdivision (d), and PERB Regulations 61000 and 61600 et seq. If the rescission petition is "timely and properly filed . . . and the proof submitted in support . . . is determined to be adequate . . . a rescission election among the employees in the established unit shall be conducted under procedures established by the Board and in accordance with election procedures described in these regulations." (PERB Reg. 61620.) Implicit in this regulation is the duty of the Office of the General Counsel to determine issues

related to whether the petition was "timely and properly" filed.[12] The Office of the General Counsel's investigation is not limited to merely determining proof of support and whether the employer has adopted local regulations concerning rescission procedures.

In *Pleasant Valley Elementary School District* (1984) PERB Decision No. 380 (*Pleasant Valley*), the Board held that the "blocking charge" rule applies to rescission elections. In that case, the exclusive representative filed an unfair practice charge alleging that the employer illegally refused to enforce the agency fee provision in effect. Shortly thereafter, a group of employees filed a rescission petition. The union amended its charge to allege that the employer's unfair practice of refusing to enforce the provision influenced employees to file the rescission petition and prevented them from exercising free choice in the anticipated election. In upholding the Board agent's decision to stay the election, the Board relied on PERB Regulation 32752,[13] which provides:

> The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice. Any determination to stay an election made by the Board pursuant to this section may be appealed to the Board itself in accordance with the provisions of Chapter 1, Subchapter 4, Article 3 of these regulations.

(Emphasis added.)

The Board noted in *Pleasant Valley, supra,* PERB Decision No. 380, at p. 5:

> In considering the stay of an election, the Board agent's obligation is to determine whether the facts alleged in the unfair

[12] The Office of the General Counsel recognized this obligation in its initial letter to the parties, dated July 8, 2013, where the parties were invited to set forth any pertinent facts or issues which should be addressed during PERB's "investigation regarding the validity of this amended petition."

[13] This regulation is identical to PERB Regulation 61190, governing elections under the MMBA.

> practice complaint, if true, would be likely to affect the vote of the employees and, thus, the outcome of the election.

(Emphasis added.)

It is clear from both the plain meaning of the above-quoted regulation and PERB precedent that the Office of the General Counsel (or Board agent), not the Board itself, investigates and determines in the first instance whether an election should be stayed because of a pending unfair practice charge. (*Jefferson School District* (1979) PERB Order No. Ad-66 [upholding administrative determination by a Board agent to block a decertification election]; *Jefferson School District* (1980) PERB Order No. Ad-82 [upholding administrative determination by Board agent that decertification election should no longer be blocked].)

In its initial position statement to the Office of the General Counsel, SEIU raised two objections to the rescission petition: (1) that the petition is untimely because a rescission election cannot occur after the expiration of an MOU; and (2) this particular rescission petition should be dismissed because employee free choice cannot occur in the shadow of the employer's alleged unfair practices. The Office of the General Counsel did not investigate or address either contention when assessing the validity of the petition.

Because SEIU's contentions were squarely presented in its position statement, it was incumbent on the Office of the General Counsel to conduct an investigation pursuant to PERB Regulation 61190, because it had learned of "alleged unlawful conduct [that] would so affect the election process as to prevent the employees from exercising free choice." SEIU's extensive position statement was more than sufficient to put the Office of the General Counsel on notice of SEIU's position that the unfair practices alleged in Case No. SF-CE-1028-M warranted a stay of the rescission election, regardless of whether SEIU filed a second unfair practice charge denominated a "blocking charge."

Additionally, the mixed question of fact and law raised by SEIU's contention that the rescission petition was untimely because of the status of the MOU and the statutory language of MMBA section 3502.5, subdivision (d), was also not addressed in the initial investigation of the petition. PERB Regulation 61620, subdivision (a) mandates that the Office of the General Counsel determine whether the rescission petition is "timely."

Thus, we remand this case back to the Office of the General Counsel so that it may investigate and determine in the first instance whether the MOU in this case is in effect or expired; if the MOU is determined to be expired, whether as a matter of law under the MMBA, a rescission election can occur after the expiration of an MOU; and whether the unfair practices alleged in Case No. SF-CE-1028-M would so affect the election process so as to prevent the employees from exercising free choice.[14]

Once the Office of the General Counsel has conducted its investigation and issued an administrative decision containing a statement of issues, fact, law and rationale,[15] such decision may be appealed to the Board itself under PERB Regulation 32360, pursuant to Regulation 61060.[16]

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[14] We note that the Office of the General Counsel did in fact stay the election in the August 23, 2013 letter to the parties, presumably pursuant to the authority vested by PERB Regulation 61190. However, this was done without any apparent investigation and findings regarding SEIU's allegation that the City's unfair practices prevents a fair election, as required by PERB Regulation 61190.

[15] PERB Regulation 32350, subdivision (b), provides: "An administrative decision shall contain a statement of issues, fact, law, and rationale used in reaching the determination."

[16] PERB Regulation 61060 provides: "Any determination rendered without a hearing shall be issued in accordance with Section 32350 and may be appealed pursuant to section 32360 of these Regulations."

Request for Stay

Pursuant to PERB Regulation 32370, SEIU filed a request for stay with the Board itself when it filed its administrative appeal. That regulation provides, in pertinent part: "The Board may stay the matter, except as is otherwise provided in these regulations."

In light of our remand of this case, we decline this request. In our view, the question of whether the rescission election should be stayed is "otherwise provided in these regulations," i.e., by PERB Regulation 61190. Under PERB Regulation 61190, the issue whether to stay the rescission election should be investigated and decided by the Office of the General Counsel. Because the Office of the General Counsel will be investigating whether the election should be blocked pursuant to PERB Regulation 61190, as well as whether the petition was timely filed, both of which determinations may be appealed to the Board under PERB Regulation 32360, SEIU's request for the Board itself to decide a stay is premature.

Interlocutory Appeal

We also dismiss SEIU's interlocutory appeal, as it is not the appropriate procedure in this matter at this point in time. PERB Regulation 61000 establishes that the Board will conduct agency fee rescission elections under the MMBA in accordance with Chapter 5 of the regulations (PERB Regs. 61000 through 61630) where, as here, a public agency has not adopted local rules concerning agency fee rescission.

As mentioned above, PERB Regulation 61060 makes administrative decisions rendered without a hearing appealable under PERB Regulation 32360.

The July 31, 2013 letter of the Office of the General Counsel is clearly a "determination rendered without a hearing." Although not titled "Determination," by its own terms it established facts, determined the sufficiency of the proof of employee support, and ordered the election to be conducted. Moreover, *Pleasant Valley, supra,* PERB Decision No. 380, and

Lemore Union High School District (1978) PERB Order No. Ad-47, demonstrates that PERB has treated Board agents' determinations regarding rescission elections as administrative decisions under PERB Regulation 32350 and therefore subject to appeal under PERB Regulation 32360.

In contrast, an interlocutory order, governed by PERB Regulation 32200, which appears in the subchapter of our regulations entitled "Hearings," contemplates an appeal from a board agent ruling made in the course of a hearing. PERB Regulation 32200 states as much: "A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself." While we do not intend by this decision to fully explicate the scope of interlocutory orders, it is clear from PERB Regulation 61060 that the Office of the General Counsel's July 31, 2013 letter was an administrative decision, not an interlocutory order.

ORDER

Based on the foregoing Decision and the entire record in this case, it is hereby ordered that Case No. SF-OS-199-M is REMANDED to the Office of the General Counsel to conduct an investigation and determine whether the rescission petition is timely, and if so, whether the election should be stayed on the basis of PERB Regulation 61190. It is also hereby ordered that the interlocutory appeal and request for stay of activity filed under PERB Regulation 32370 be DISMISSED.

Chair Martinez; Members Huguenin and Banks joined in this Decision.